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Public Prosecutor v Lee Chor Hean

B HIGH COURT (GEORGETOWN) — CRIMINAL TRIAL NO 45B-07–04 OF 2016
LIM CHONG FONG J
28 DECEMBER 2018

C *Criminal Law — Offences — Murder — Accused charged with offence of murder punishable under s 302 of the Penal Code — Whether deceased died — Whether death caused by injury suffered by deceased — Whether death caused by act of accused — Whether accused had intention to cause bodily injury and sufficient in ordinary nature to cause death — Whether prima facie case established by prosecution — Penal Code ss 300 & 302*

D

Evidence — Admissibility — Electronic or computer evidence — Whether evidence from CCTV admissible — Whether mandatory to testify for ordinary use of CCTV decoder — Evidence Act 1950 s 90A

E

The accused in the present case was charged for the offence of murder. On 20 May 2015, when operating her restaurant, SP8 saw a motorcycle fallen upon a man on the back lane about 100 metres away. She then saw a man riding on another motorcycle approaching the fallen motorcycle to pick something up. As the result, she asked her husband to notify the police. The police then received a report that a Chinese man was shot down at the back of a shop in Taman Clarissa Villa Park, Jalan Bagan Lalang Butterworth, Penang. SP10 and his team which included SP15 went to the crime scene and found the body of a Chinese man who was later identified by his brother, SP7 at the mortuary as Goh Wooi Loon. SP15 examined the victim and discovered a gunshot wound on the back of his neck below the ear. The body of the victim was sent to the Hospital Seberang Jaya, Pulau Pinang and the post-mortem found that the cause of death was due to gunshot wound to the neck of the victim. SP14 together with SP12 and Lance Cpl Mohd Anas went to the Eng Tatt Trading shop and viewed the CCTV recording captured by CCTV cameras of Eng Tatt Trading shop on 12 May 2015. The viewing was from the monitor screen linked to the decoder. According to SP12, he clearly saw from the video recording there were two men riding two separate motorcycles. Both riders stopped at the crime scene and had a conversation. Suddenly, the rider of the motorcycle whipped a pistol and shot the other man on the side of his face. The man who was shot fell on the ground and the rider on the motorcycle left the crime scene. Subsequently, the rider on the motorcycle returned to the crime scene and retrieved something from the man who was lying on the ground.

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SP14 and his team again on 18 May 2015 went to Eng Tatt Trading shop to retrieve the video recording from the decoder by way of burning three CDs from the decoder. After investigation with the Road Transport Department, SP15 discovered that the accused was the registered owner of the motorcycle which was a Honda Ex model bearing number plate PFH 8515. The prosecution sent the CDs of the CCTV video recording burned from the decoder in Eng Tatt Trading shop ('exhs P87C and P88C') as well the decoder seized from the house of the accused ('exh P82') to SP13 for forensic analysis including visual image enhancement. From exh P82, SP13 saw a Chinese man leaving the house of the accused riding the motorcycle at about 5pm on 12 May 2015. He returned riding the motorcycle at about 9pm on the same day. Furthermore from exhs P87C and P88C, SP13 saw and confirmed what was seen by SP12 on 13 May 2015 from the monitor screen of the decoder in Eng Tatt Trading shop. Both SP13 and SP15 testified that the Chinese man riding on the motorcycle seen from the CCTV video recordings was indeed the accused. The issues for determination by the present court were: (a) whether prima facie case was established by the prosecution; and (b) whether the CCTV evidence tendered to the court was admissible.

Held, acquitting and discharging the accused:

(1) It was incumbent upon the prosecution to mandatorily either tender the certificate of the person who managed and maintained the decoder in Eng Tatt Trading shop and in the house of the accused pursuant to s 90A(2) of the EA or otherwise procure their attendance in the court to testify that the respective decoders were in good working condition and properly functioning in its ordinary use at the time when the video recording was recorded from the CCTV cameras. It was inadequate for the prosecution to rely on the mere testimony of TWT1. The prosecution failed to comply with the mandatory requirements of s 90A of the EA to have exhs P87C, P88C and P82 admitted in evidence and thus were inadmissible in evidence. Consequently, the evidence of SP13 as well as her reports in exhs P92, P96 and P100 as well as the photographs in exhs P3 and P5 which were all produced from exhs P87C, P88C and P82 were also inadmissible in evidence (see paras 31–33).

(2) The first ingredient of the offence was proved by the prosecution as SP7 and SP15 had identified the victim in the mortuary as well as in the court from the photographs tendered by the prosecution. The death of the victim was corroborated by the testimony of SP4 who performed the autopsy on the body of the victim (see paras 38–39).

(3) The second ingredient of the offence was adequately proved by the prosecution as the death was due to a gunshot wound to the neck as explained by SP4 who performed the autopsy on the victim. It was a fatal gunshot to the neck of the victim (see paras 40–41).

(4) For the third ingredient of the offence, there was no unequivocal evidence that the accused was the rider of the motorcycle at the time the victim was shot. The court could not safely infer and conclude that the accused was indeed the rider of the motorcycle at the material time the victim was shot. There was no evidence adduced by the prosecution of any relationship or friendship between the accused and the victim. There was nothing to objectively link one with the other. There was no evidence that the accused was connected in any way with the possession of the gun or bullets used to shoot the victim. The court was not satisfied that the prosecution had succeeded in proving the third ingredient of the offence beyond reasonable doubt that the death of the victim was caused by the accused on maximum evaluation. The prosecution had therefore failed to establish a prima facie case against the accused as charged (see paras 49–51 & 53).

[Bahasa Malaysia summary

Tertuduh dalam kes ini telah didakwa atas kesalahan membunuh. Pada 20 Mei 2015, ketika mengendalikan restorannya, SP8 menyaksikan motosikal jatuh ke atas seorang lelaki di lorong belakang kira-kira 100 meter jauhnya. Dia kemudian melihat seorang lelaki menunggang motosikal yang lain menghampiri motosikal yang jatuh untuk mengambil sesuatu. Oleh itu, dia meminta suaminya memaklumkan kepada polis. Polis kemudian menerima laporan bahawa seorang lelaki Cina ditembak di belakang sebuah kedai di Taman Clarissa Villa, Jalan Bagan Lalang Butterworth, Pulau Pinang. SP10 dan pasukannya termasuk SP15 pergi ke tempat kejadian dan mendapati mayat seorang lelaki Cina yang kemudian dikenal pasti oleh saudaranya, SP7 di rumah mayat sebagai Goh Wooi Loon. SP15 memeriksa mangsa dan menemui luka tembakan di belakang lehernya di bawah telinga. Mayat mangsa dihantar ke Hospital Seberang Jaya, Pulau Pinang dan bedah siasat mendapati punca kematian adalah akibat luka tembakan ke leher mangsa. SP14 bersama SP12 dan Lans Korporal Mohd Anas pergi ke kedai Eng Tatt Trading dan melihat rakaman CCTV yang ditangkap oleh kamera CCTV kedai Eng Tatt Trading pada 12 Mei 2015. Tontonan adalah dari skrin monitor yang berhubung dengan dekoder. Menurut SP12, dia jelas melihat dari rakaman video terdapat dua lelaki yang menunggang dua motosikal berasingan. Kedua-dua penunggang berhenti di tempat kejadian dan berbual. Tiba-tiba, penunggang motosikal mengeluarkan pistol dan menembak lelaki satu lagi di sebelah mukanya. Lelaki yang ditembak jatuh di tanah dan penunggang motosikal meninggalkan tempat kejadian. Seterusnya, penunggang motosikal itu kembali ke tempat kejadian dan mengambil sesuatu dari lelaki yang berbaring di atas tanah. SP14 dan pasukannya sekali lagi pada 18 Mei 2015 pergi ke kedai Eng Tatt Trading untuk mendapatkan rakaman video dari dekoder dengan mencetak tiga CD dari dekoder. Selepas siasatan dengan Jabatan Pengangkutan Jalan, SP15 mendapati bahawa tertuduh adalah pemilik berdaftar motosikal yang merupakan model Honda Ex yang mengandungi plat

nombor PFH 8515. Pihak pendakwaan menghantar CD rakaman video CCTV yang dicetak dari dekoder kedai Eng Tatt Trading ('ekshs P87C dan P88C') serta dekoder yang disita dari rumah tertuduh ('eksh P82') kepada SP13 untuk analisis forensik termasuk peningkatan imej visual. Dari eksh P82, SP13 melihat seorang lelaki Cina meninggalkan rumah tertuduh menunggang motosikal kira-kira pukul 5 petang pada 12 Mei 2015. Dia kembali menaiki motosikal kira-kira pukul 9 malam pada hari yang sama. Selain daripada ekshs P87C dan P88C, SP13 menyaksikan dan mengesahkan apa yang dilihat oleh SP12 pada 13 Mei 2015 dari skrin monitor dekoder di kedai Eng Tatt Trading. Kedua-dua SP13 dan SP15 memberi keterangan bahawa lelaki Cina menunggang motosikal dilihat dari rakaman video CCTV adalah memang tertuduh. Isu-isu untuk penentuan oleh mahkamah ini adalah: (a) sama ada kes prima facie telah dibuktikan oleh pihak pendakwaan; dan (b) sama ada keterangan CCTV yang dikemukakan kepada mahkamah boleh diterima.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Adalah menjadi kewajipan pihak pendakwaan untuk secara mandatori sama ada mengemukakan perakuan orang yang menguruskan dan mengekalkan dekoder di kedai Eng Tatt Trading dan di rumah tertuduh menurut s 90A(2) AK atau selainnya mendapatkan kehadiran mereka di mahkamah untuk memberi keterangan bahawa dekoder masing-masing berada dalam keadaan baik dan berfungsi dengan baik dalam kegunaan biasa pada masa rakaman video dirakam dari kamera CCTV. Ia tidak mencukupi untuk pihak pendakwaan bergantung kepada testimoni TWT1 semata-mata. Pihak pendakwaan gagal untuk mematuhi keperluan mandatori s 90A AK untuk mendapatkan ekshs P87C, P88C dan P82 diterima sebagai keterangan dan dengan itu tidak dapat diterima sebagai keterangan. Oleh itu, keterangan SP13 serta laporannya dalam ekshs P92, P96 dan P100 serta gambar-gambar dalam ekshs P3 dan P5 yang semuanya dihasilkan daripada ekshs P87C, P88C dan P82 juga tidak dapat diterima sebagai keterangan (lihat perenggan 31–33).

(2) Unsur pertama kesalahan itu dibuktikan oleh pihak pendakwaan kerana SP7 dan SP15 telah mengenal pasti mangsa di bilik mayat serta di mahkamah dari gambar-gambar yang dikemukakan oleh pihak pendakwaan. Kematian mangsa disahkan oleh testimoni SP4 yang melakukan bedah siasat pada tubuh mangsa (lihat perenggan 38–39).

(3) Unsur kedua kesalahan itu dibuktikan dengan cukup oleh pihak pendakwaan kerana kematian itu disebabkan oleh luka tembakan ke leher seperti yang dijelaskan oleh SP4 yang melakukan bedah siasat ke atas mangsa. Ia adalah tembakan maut ke leher mangsa (lihat perenggan 40–41).

(4) Bagi unsur ketiga kesalahan itu, tiada keterangan yang jelas bahawa tertuduh adalah penunggang motosikal ketika mangsa ditembak.

Mahkamah tidak dapat membuat kesimpulan dan memutuskan dengan selamat bahawa tertuduh memang penunggang motosikal pada masa yang material ketika mangsa ditembak. Tiada keterangan yang dikemukakan oleh pihak pendakwaan tentang mana-mana hubungan atau persahabatan antara tertuduh dan mangsa. Tiada apa-apa untuk menghubungkan secara objektif antara satu sama lain. Tiada keterangan bahawa tertuduh berkaitan dengan apa-apa cara dengan memiliki senjata atau peluru yang digunakan untuk menembak mangsa. Mahkamah tidak berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan unsur ketiga kesalahan itu di luar keraguan munasabah bahawa kematian mangsa itu disebabkan oleh tertuduh pada penilaian maksimum. Oleh itu pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh seperti yang didakwa (lihat perenggan 49–51 & 53).]

Notes

For a case on electronic or computer evidence, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 110.

For cases on murder, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2079–2096.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (folld)
Aziz bin Mat Shah v PP [2010] MLJU 2200; [2010] 4 CLJ 305, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134, CA (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, SC (refd)
Mohd Ali Jaafar v PP [1998] 4 MLJ 210, HC (refd)
Mohd Khayry bin Ismail v PP [2014] 4 MLJ 317, CA (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148, SC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
PP v Abdul Razak bin Dalek [2007] 2 MLJ 255; [2006] 4 CLJ 129, HC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Jowy Manjoro [2007] 6 MLJ 342, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
PP v Sarjit Kaur a/p Najar Singh [1998] 1 MLJ 184; [1998] 5 CLJ 609, HC (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)

Legislation referred to

Criminal Procedure Code ss 180, 399
Evidence Act 1950 ss 3, 90A, 90A(2), (4)

Penal Code ss 300, 300(c), 302

Ramkarpal Singh (Loo Wooi Meen with him) (Karpal Singh & Co) for the accused. Naizatul Zima bt Tajudin (Penang State Legal Advisor's Office) for the prosecution.

Lim Chong Fong J:

PRELIMINARY

[1] The accused Lee Chor Hean was on 28 September 2016 charged as follows:

> Bahawa kamu pada 12/5/2015 antara 7.00 sehingga 7.30 malam di lorong di belakang teres kedai Taman Clarissa Villa Park Jalan Bagan Lalang, Butterworth, Seberang Perai Utara, di dalam Negeri Pulau Pinang telah membunuh Goh Wooi Loon KP: 840504-07- 5869 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh di hukum di bawah seksyen 302 Kanun Keseksaan. Jika disabit kesalahan hendaklah dijatuhkan hukuman gantung sampai mati.

[2] The trial of the prosecution's case (including the trial within a trial) took 14 days on 28 and 29 September 2016, 23 November 2016, 16 and 17 February 2017, 10 and 11 April 2017, 31 May 2017, 17 to 19 July 2018, 30–31 July 2018 and 10 August 2018. The trial was originally heard by Azmi Ariffin J but I took over from 17 July 2018 upon His Lordship's transfer to the Shah Alam High Court. In the course of the trial, exhs P1–P113 were admitted in evidence.

[3] The prosecution called the following witnesses:

(a) Cpl Abdul Hamid bin Abdullah ('SP1'), a photographer in the Polis Diraja Malaysia ('PDRM');

(b) Cpl Ismail bin Abu Bakar ('SP2'), a photographer in the PDRM;

(c) Cpl Azizul bin Aziz ('SP3'), a photographer in the PDRM;

(d) Dato' Dr Bhupindar Singh ('SP4'), a retired pathologist formerly attached to the Forensic Department of the Penang Hospital;

(e) Asfarina bt Jamal ('SP5'), a science officer of the Department of Chemistry, Penang;

(f) Lim Wei Choy ('SP6'), the father of the accused;

(g) Goh Wooi Chew ('SP7'), the brother of Goh Wooi Loon;

(h) Shanta Kumasi a/p Jaganathan ('SP8'), a restaurateur operating Arumai Restoran at No 7450 Jalan Bagan Lalang, Taman Clarissa Villa, Butterworth, Penang ('restaurant');

(i) Lance Cpl Mohd Rozaimi bin Mohd Zain ('SP9'), a constable in the PDRM;

(j) ASP Anantha Rao a/l Ramalo ('SP10'), an officer in the PDRM;

(k) ASP Mohd Yusof bin Hj Ibrahim ('SP11'), an officer in the PDRM;

(l) Sgt Ismail bin Mohd Nooh ('SP12'), a detective in the PDRM;

(m) Insp Nur Farah Syuhada ('SP13'), an officer and forensic laboratory analyst in the PDRM;

(n) Lance Cpl Mohd Aliff Fahmy bin Husin ('SP14'), a constable in the PDRM; and

(o) DSP Norazizi bin Saad ('SP15'), an officer in the PDRM and the investigating officer of the case.

[4] After the close of the prosecution's case, the parties furnished their respective written submissions and I heard oral arguments as well as clarification from counsel on 9 November 2018.

THE PROSECUTION'S CASE

[5] According to the evidence as adduced by the prosecution, SP8 and her husband Arumai Nandhan a/l Thandia ('Arumai') on 20 May 2015 *(sic)* between 6–7pm were operating their restaurant. SP8 heard a loud bang resembling that of firing firecrackers. She opened the back door of the restaurant and saw a motorcycle fallen upon a man on the back lane about 100 metres away. She then saw a man riding on another motorcycle approaching the fallen motorcycle to pick something up. As the result, she asked Arumai to notify the police.

[6] SP9 on 12 May 2015 at 7.30am *(sic)* whilst on duty at the reception counter of the Mak Mandin community police station received a public telephone call from Arumai that a Chinese man was shot down at the back of a shop in Taman Clarissa Villa Park, Jalan Bagan Lalang Butterworth, Penang ('place of incident'). Consequently SP9 notified his superiors; Assistant Superintendent of Police Teh Ten Hai and Insp Winston. He also lodged his Mak Mandin police report No 1651/2015 (exh P57).

[7] As the result, SP10 and his team which included SP15 forthwith went to the place of incident at 8.15pm and found the body of a Chinese man who was later identified by his brother SP7 at the mortuary as Goh Wooi Loon (identity card No 840504–07–5869) ('victim'). SP15 examined the victim and discovered a gunshot wound on the back of his neck below the ear. He also found a 9mm Luger bullet shell 6.2 metres away. The victim's motorcycle is a

Honda C90 bearing number plate PEC 7598. The photographs of the place of incident (exhs P12 (1–26)) were taken by SP3 as directed by SP10. The case materials that were found at the place of incident were all collected and sent to the Forensic Department of the PDRM. The body of the victim was sent to the Hospital Seberang Jaya, Pulau Pinang.

[8] On 13 May 2015 at about 9.50am, SP4 carried out the post-mortem on the victim at the Hospital Seberang Jaya mortuary. The post-mortem findings are contained in SP4's report of post-mortem examination No PM153/15 (exh P18). He found there was a gunshot entry wound over the junction of the right angle of mandible and lobule of the right ear and a gunshot exit wound over the left side of neck below the left angle of the mandible. The haemorrhagic wound track had penetrated the right sternocleidomastoid muscle and right carotid sheath, lacerating the right common carotid artery and internal jugular vein before penetrating the retropharyngeal space, left carotid sheath, lacerating the left common carotid artery and left internal jugular vein and exiting through the left sternocleidomastoid muscle and subcutaneous tissue. He concluded that the cause of death is due to gunshot wound to the neck of the victim.

[9] Also on 13 May 2015 at around 11am, SP14 together with SP12 and Lance Cpl Mohd Anas went to the Eng Tatt Trading shop situated at Clarissa Villa, Jalan Bagan Lalang, Butterworth Pulau Pinang and viewed the CCTV recording captured by CCTV cameras of Eng Tatt Trading shop on 12 May 2015. The viewing was from the monitor screen linked to the decoder. According to SP12, he clearly saw from the video recording there were two men riding two separate motorcycles. The number plate of one of the motorcycles is PFH 8515 ('motorcycle'). Both riders stopped at the place of incident and had a conversation. Suddenly, the rider of the motorcycle whipped a pistol and shot the other man on the side of his face. The man who was shot fell on the ground and the rider on the motorcycle left the place of incident. Subsequently, the rider on the motorcycle returned to the place of incident and retrieved something from the man who was lying on the ground. SP14 and his team again on 18 May 2015 went to Eng Tatt Trading shop to retrieve the video recording from the decoder by way of burning three CDs from the decoder.

[10] After investigation with the Road Transport Department, SP15 discovered that the accused is the registered owner of the motorcycle which is a Honda Ex model bearing number plate PFH 8515. Thus SP11 and his team on 15 May 2015 went to the house of the accused at No 1317, Jalan Kubang Semang, Permatang Pauh, Pulau Pinang. He saw the accused in the house. The motorcycle was also parked outside the house. SP11 saw blood stains on the windshield of the left side of the motorcycle, a white coloured cover of the pink coloured plastic Cintan box in the basket of the motorcycle and a grey coloured

helmet that was hung on the motorcycle. The motorcycle (exh P72), plastic Cintan box (exh P43), grey helmet (exh P45) and other suspected relevant things such as raincoat, face mask, etc were all seized. The accused was accordingly also arrested by SP11 at around 8.05pm and he lodged Seberang Jaya police report No 003749–3750/15 dated 16 May 2015 (exh P73).

[11] The things that were seized from the house of the accused were sent by SP15 to SP10 for forensic examination including DNA profiling analysis on 19 May 2015. The forensic examination results are contained in SP10's report No 15-FR-P-02619 dated 17 June 2015 made pursuant to s 399 of the Criminal Procedure Code (exh P19). SP10 found, inter alia, that the DNA profile of the victim obtained from his t-shirt, short trousers, underpants and money notes retrieved from the place of incident matched his DNA profile in the blood stains of the windshield of the motorcycle and the plastic Cintan box. In addition, she found that there were mixed DNA profiles belonging to two individuals on the cotton swab of sweat obtained from the left handle of the motorcycle. The DNA of the accused could not be excluded as one of the individuals.

[12] Moreover, the prosecution sent the CDs of the CCTV video recording burned from the decoder in Eng Tatt Trading shop (exhs P87C and P88C) as well the decoder seized from the house of the accused (exh P82) to SP13 of the Forensic Department of the PDRM for forensic analysis including visual image enhancement. From exh P82, SP13 saw a Chinese man leaving the house of the accused riding the motorcycle at about 5pm on 12 May 2015. He returned riding the motorcycle at about 9pm on the same day. Furthermore from exhs P87C and P88C, SP13 saw and confirmed what was seen by SP12 on 13 May 2015 from the monitor screen of the decoder in Eng Tatt Trading shop. Both SP13 and SP15 testified that the Chinese man riding on the motorcycle seen from the CCTV video recordingsis indeed the accused. The forensic analysis reports produced by SP13 are contained in her report No 15F1630 dated 23 September 2015 (exh P92), report No F15F1659 dated 22 September 2015 (exh P96) and report No 15F3249 dated 3 March 2016 (exh P100).

[13] In the premises, the prosecution submitted that the ingredients that constituted the charge of culpable homicide amounting to murder pursuant to s 300(c) of the Penal Code have been sufficiently proved and the prosecution relied on the Court of Appeal case of *Aziz bin Mat Shah v Public Prosecutor* [2010] MLJU 2200; [2010] 4 CLJ 305 and *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 as well as the case of *Public Prosecutor v Abdul Razak bin Dalek* [2007] 2 MLJ 255; [2006] 4 CLJ 129. Although there is no direct evidence from eye witnesses on the murder of the victim by the accused, the prosecution submitted that the collective circumstantial evidence adduced

by the prosecution irresistibly pointed to the guilt of the accused murdering the victim. Reliance has been made on the cases of *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148 and *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 5 CLJ 609.

[14] The prosecution therefore submitted that a prima facie case has been made out and the accused accordingly be ordered to enter his defence.

THE DEFENCE'S REPLY

[15] The defence contended that the main thrust of the prosecution's case is the CCTV video recordings at the place of incident at the back of Eng Tatt Trading shop and outside the house of the accused. In respect of the former, SP12 testified as follows as seen from the following excerpts of his evidence under examination-in-chief and cross-examination:

Q: Adakah CCTV yang dimainkan itu CCTV yang Sjn lihat dia download dari Eng Tatt Trading?

A: Betul, YA.

Q: Selain daripada anggota kamu siapa yang ada lagi di kedai tersebut?

A: Manager Eng Tatt Trading, satu perempuan Cina dan satu technician lelaki Cina.

...

Q: So kita pergi pada 13/5/2015 dan 18/5//2015?

A: 13/5/2015 pergi melihat dan 18/5/2015 untuk rakaman.

Q: So kedua-duanya tak dibuat pada hari yang sama?

A: Tak boleh YA, sebab technician Ooi Jeat Sheng keluar bekerja.

Q: So setuju kan tanpa Ooi Jeat Sheng tersebut, we can't do anything sebab dia yang mengawal komputer CCTV tersebut?

A: Ya, YA.

Q: Tapi tadi Tuan ada kata kita dah lihat CCTV dengan Ooi Jeat Sheng, kita sampai sana pukul 11.00 pagi dia tak ada sana so we couldn't do anything sebab kita tak kawal komputer CCTV so kita kena tunggu dia balik. Dia balik setengah jam kemudian 11.30 pagi dan dia membuka CCTV kita lihat CCTV itu, betul?

A: Ya, YA.

In addition, SP14 testified as follows as seen from the following excerpts of his

evidence under cross-examination:

Q: Tapi orang yang actually mainkan peralatan CCTV adalah lelaki Cina iaitu pekerja Syarikat Eng Tatt betul?

A: Betul YA.

As for the latter, SP11 testified as follows in the excerpts of his evidence under cross-examination:

Q: Bukan Tuan. Siapa yang kendalikan atau uruskan CCTV di rumah itu sebelum rampasan?

A: Oleh ahli keluarga.

Q: Siapa yang kendalikan? Siapa yang uruskan?

A: Bapa kepada OKT.

Q: Kamu ada siasat atau bagi tahu sahaja?

A: Masa kejadian memang dia orang yang, ahli keluarga yang buat.

Q: Bukan isu akses Tuan. Siapa yang menguruskan CCTV di rumah itu sehingga kejadian? Adakah kamu tahu atau tidak?

A: Saya tidak tahu, YA.

[16] The defendant hence submitted that the decoder of the CCTV video recordings in the Eng Tatt Trading shop was managed by Ooi Jeat Sheng and he was responsible for the operation of the same. As for the decoder seized from the house of the accused, it was not established by the prosecution as to who managed and was responsible for that decoder. In the premises, the defence contended that the CCTV video recordings and all other evidence connected thereto are inadmissible in evidence for non compliance with s 90A of the Evidence Act 1950 ('the EA') that is mandatory.

[17] As the result of the inadmissibility and hence exclusion of the CCTV video recording evidence, the defence accordingly contended that the remaining strands of circumstantial evidence adduced by the prosecution fell far short and are plainly inadequate to irresistibly conclude that the accused is guilty as charged following the Supreme Court case of *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306. According to the defence, the following glaring doubts will persist and remain unanswered if the accused opts to remain silent:

(a) was it the accused or another third party who was riding the motorcycle as seen by PW8 at the back of the restaurant that evening of 12 May 2015?

(b) could that third party have been one of the siblings of the accused or another person since they had access to the motorcycle and since the DNA of a third party was found on the left handle of the motorcycle?

(c) why did the prosecution not call the siblings of the accused to exclude the possibility of them having used the motorcycle?

(d) since the gun that was used to murder the victim was never recovered, can it be presumed that the accused disposed it to eliminate any trace of involvement? If this was so, why did the accused not wipe away the blood stains on the motorcycle if he indeed committed the crime?

(e) was the gun that was used never recovered because the murder was committed by a third party? and

(f) why was there no evidence of the accused having fled as well as resisting arrest in his house if it was not for the fact he was not involved in murdering the victim?

The defence thus referred to the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held as follows:

> It is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer. The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation on his part but on the positive affirmative evidence of his guilt given by the prosecution. Numerous rules have from time to time been suggested by the courts when dealing with the question of the guilt or innocence of the accused. The following principles are not only sound but well recognised in practice:
>
> (1) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution;
>
> (2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused;
>
> (3) In matters of doubt it is safer to acquit than to condemn.
>
> A conviction cannot be sustained even if the court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true.' The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.

[18] In the circumstances, the defence submitted that the prosecution has

undoubtedly failed to prove a prima facie case against the accused and he must accordingly be discharged and acquitted at this stage.

FINDINGS OF THE COURT AT THE CLOSE OF THE PROSECUTION'S CASE

[19] My duty at the close of the prosecution's case is provided in s 180 of the Criminal Procedure Code as follows:

> 180 Procedure after conclusion of case for prosecution
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[20] Augustine Paul JCA (later FCJ) explained the meaning of prima facie case as follows in the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown by evidence in rebuttal ... The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if

it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[21] It is in other words an exercise of maximum evaluation of the prosecution evidence in totality as to whether they are sufficient to prove each and every ingredient of the offence after having evaluated the credibility of witnesses as well as the veracity of the documentary and real evidence subject of course to the rules of evidence as set down in the EA.

[22] I will firstly deal with the CCTV video recordings that have been vehemently objected to by the defence. During the course of the trial, the prosecution sought to adduce in evidence CCTV video recordings that were recorded from cameras placed at the back of the Eng Tatt Trading shop which is situated proximately to the place of incident as well as outside the house of the accused. The aforesaid video recordings were respectively stored in the decoder which belonged to the Eng Tatt Trading shop and in a Deckwork video decoder which likely belong to the accused or his siblings living in the house of the accused.

[23] The video recordings that were stored in the Eng Tatt Trading shop were reproduced in three CDs but only two CDs were produced in court because one of them was damaged and hence unplayable. The two other CDs were identified and labelled as ID87C and ID88C. The Deckwork video decoder itself was brought to court and labelled as exh P82. The defence however objected to the admissibility of the two CDs as well as the decoder particularly on their contents.

[24] Accordingly, Azmi Ariffin J ordered that a trial within a trial be held to determine the admissibility of ID87C, ID88C and exh P82. The trial within a trial took 1 day on 31 May 2017. The prosecution as the result called SP14 ('TWT1') and SP11 ('TWT2') to testify on the relevant facts on the aforesaid video recordings. When I took over the trial, I made it clear that my ruling on the admissibility of exhs ID87C, ID88C and P82 would be made together with the ruling of prima facie case following *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210. Hence at the request of the prosecution and acceded to by the defence, I provisionally converted the labelling of the two CDs to exhs P87C and P88C subject to my later determination on their admissibility.

[25] The relevant excerpts of TWT1's evidence are as follows during examination-in-chief and cross-examination respectively:

Q: Pada 18/5/2015 pada jam lebih kurang 6.00 petang, pada masa itu L/Kpl ada bersama siapa?

A: Saya bersama-sama DSjn Ismail bin Noh dan L/Kpl Mohd Anas bin Mohd Lazim, berada di pejabat pergi ke kedai aksesori Butterworth Eng Tatt. Telah pergi minta satu rakaman CCTV didapati pemilik tersebut kurang beri kerjasama kepada pihak polis. Tujuan kami adalah untuk melihat rakaman CCTV, dan saya dapat tengok rakaman CCTV tersebut.

...

Q: Sjn Ismail burn CD macam mana dia burn CD tersebut?

A: Menggunakan software yang ada dalam komputer tersebut. Dia dapat burn kedua-dua CD tersebut.

...

and

Q: L/Kpl.— pada 18/5/2015, 3 anggota pergi ke kedai Eng Tatt, siapa pemilik Eng Tatt pada hari itu?

A: Saya tak pasti.

Q: Mesti jumpa pemilik kedai kan?

A: Jumpa supervisor sahaja.

...

Q: Siapakah orang yang membenarkan ketiga-tiga anggota ke dalam pejabat itu?

A: Nama saya tak ingat.

Q: Adakah itu merupakan seorang Cina?

A: Ya.

...

Q: Saya cadangkan tanpa kebenaran orang Cina tersebut, maka ketiga-tiga anggota tidak boleh masuk?

A: Ya.

Q: Setujukah orang Cina tersebut merupakan supervisor?

A: Pekerja dalam itu.

Q: Dia bukan supervisor

A: Tidak.

Q: Ada boss yang lain?

A: Ada.

Q: Jadi orang Cina tersebut bukannya bosslah?

A: Ya.

Q: Jadi saya cadangkan bahawa kita masuk ke pejabat nak lihat CCTV ada komputer?

A: Ya.

Q: Komputer itu menujukkan imej-imej CCTV tersebut?

A: Ya.

Q: Saya cadangkan bahawa orang yang bertanggung jawab untuk mengendalikan komputer tersebut, bukannya orang Cina atau pekerja yang membenarkan ketiga-tiga anggota termasuk L/Kpl masuk ke dalam permis tersebut- setuju?

A: Setuju.

Q: Semasa burnkan CD itu siapa yang bertanggung jawab pengendalian komputer?

A: Ah, technician. Minta maaf D/Sjn Ismail.

The relevant excerpt of TWT2's evidence during examination-in-chief is as follows:

Q: Pada 15/5/2015 jam lebih kurang 8.00 malam, ASP berada di mana?

A: Saya membuat serbuan di alamat No. 1317, Jalan Kubang Semang, Permatang Pauh, Bukit Mertajam.

...

Q: Dari luar rumah ada nampak alat-alat CCTV di luar rumah?

A: Ada di rumah No. 1317, Jalan Kubang Semang, Permatang Pauh.

Q: ASP ada buat rampasan kes yang berkaitan dengan CCTV ini?

A: Ada. Rampasan adalah satu unit Deckwork Video Recorder yang bertulis digital video siri seperti di ms 2 dan rampasan 1 unit power supply. Dijumpa di bahagian ruang tamu di dalam rumah.

Q: Semasa itu OKT ada dalam rumah?

A: OKT ada dalam rumah.

[26] The defence principally contended that the two CDs and the video decoder (exhs P87C, P88C and P82) are inadmissible in evidence for non compliance with s 90A read together with s 3 of the EA that provides as follows:

3 Interpretation

In this Act, unless the context otherwise requires —

'computer' means an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility;

...

'document' means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of —

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(b) any visual recording (whether of still or moving images);

(c) any sound recording, or any electronic magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b), or (c),

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;

ILLUSTRATIONS

A writing is a document.

Words printed, lithographed or photographed are documents.

A map, plan, graph or sketch is a document.

An inscription on wood, metal, stone or any other substance, material or thing is a document.

A drawing, painting, picture or caricature is a document.

A photograph or a negative is a document.

A tape recording of a telephonic communication, including a recording of such communication transmitted over distance, is a document.

A photographic or other visual recording, including a recording of a photographic or other visual transmission over a distance, is a document.

A matter recorded, stored, processed, retrieved or produced by a computer is a document;

90A Admissibility of documents produced by computers, and statements contained therein

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3)(a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry, in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was —

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[27] In this respect, the defence contended that there was no certificate pursuant to s 90A(2) of the EA produced from the person responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used. That notwithstanding, the prosecution did not also alternatively call the person(s) to attend court to testify on the same during the trial within a trial. The defence referred and relied on the Court of Appeal case of *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134.

[28] The prosecution in rebuttal contended that the testimony of TWT1 and TWT2 as witnesses at the trial within a trial are sufficient to satisfy the requirement of s 90A(2) of the EA. In this regard, TWT1 testified that he together with SP12 and Lance Cpl Mohd Anas went to the Eng Tatt Trading shop on 13 May 2015 at about 11am to view the video recording recorded in the decoder by the CCTV cameras on 12 May 2015 at about 7.15pm. Subsequently they went again to Eng Tatt Trading shop on 18 May 2015 and SP12 burned into three CDs the same video recording they saw on 13 May 2015 from the decoder. Two of the CDS (exhs P87C and P88C) are now produced in c ourt. Moreover, TWT2 testified that he had during the arrest of the accused on 15 May 2015 also seized the decoder (exh P82) of the video recordings recorded by the CCTV cameras from the house of the accused. The prosecution refer and relied on the Federal Court case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 and the Court of Appeal case of *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317.

[29] My reading of s 90A of the EA descry the computer must be demonstrated to have been in good serviceable condition and functioning properly in the course of its ordinary use at the material time the document was produced by the computer before that intended document is admissible as evidence in court. This has been expressly made clear in s 90A(2) and (4) of the EA itself. For the purposes herein, the computer meant the decoder that recorded the video recordings and the document meant the recorded visual images captured by the CCTV cameras.

[30] In the Court of Appeal case of *Hanafi bin Mat Hassan v Public Prosecutor*, Augustine Paul JCA (later FCJ) held as follows also with emphasis added by me:

> [21] In the case of *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1, learned counsel submitted that the computer produced document could only be admitted under s 90A if the prosecution proved not only that it was produced by a computer but also that it was produced in the course of its ordinary use and that in order to do so it was incumbent upon the prosecution to produce a certificate signed by someone solely in charge of the computer which produced the printout as required by s 90A(2). He further submitted that a failure to produce the

certificate was fatal and would render the document inadmissible. Shaik Daud JCA in writing for the Court of Appeal did not agree with the submission of learned counsel.

His Lordship proceeded to hold that a document produced by a computer is admissible under s 90A(1) if it was produced by a computer and that it was produced by the computer in the course of its ordinary use. With regard to the need to tender in evidence the certificate it was held that since s 90A uses the word 'may' a certificate need not be produced in every case. In commenting on the circumstances when the certificate must be tendered in evidence Shaik Daud JCA said (at p 11):

> It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. ... It would be superfluous to have a provision such as in sub-s (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s (6).

[22] It is implicit in the judgment of Shaik Daud JCA that what is required to be proved in order to render a document admissible under s 90A are only that it was produced by a computer and that it was produced by the computer in the course of its ordinary use. It was held that these matters could be proved by the tendering of oral evidence to show that the document was produced by a computer thereby activating the presumption in s 90A(6) to show that the document was produced by the computer in the ordinary course of its use or, alternatively, by the production of a certificate to establish the same presumed fact. In other words s 90A(6) has been construed only as an alternative mode of proof to the use of a certificate.

[23] *A careful perusal of s 90A(1) reveals that in order for a document produced by a computer to be admitted in evidence it must have been produced by the computer in the course of its ordinary use. It is therefore a condition precedent to be established before such a document can be admitted in evidence under s 90A(1). The manner of establishing this condition has been prescribed. It can be proved by tendering in evidence a certificate as stipulated by s 90A(2) read with s 90A(3). Once the certificate is tendered in evidence the presumption contained in s 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. Section 90A(4) must therefore be given its full effect as it has a significant role to play in the interpretation and application of s 90A. Ordinarily a certificate under s 90A(2) must be tendered in evidence in order to rely on the provisions of s 90A(3) and (4). However, the use of the words 'may be proved' in s 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases. In Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705*, a plethora of authorities was referred to in ruling that facts to be presumed can, instead, be proved by other admissible evidence which is available (at*

pp 722–723). Thus the use of the certificate can be substituted with oral evidence as demonstrated in R v Shepherd [1993] 1 All ER 225 *in dealing with a provision of law similar to s 90A. Needless to say, such oral evidence must have the same effect as in the case of the use of a certificate. It follows that where oral evidence is adduced to establish the requirements of s 90A(1) in lieu of the certificate the presumptions attached to it, in particular, the matters presumed under s 90A(4) must also be proved by oral evidence. In commenting on the nature of the evidence required to discharge the burden in such an event Lord Griffiths said in R v Shepherd* [1993] 1 All ER 225 at p 231:

> The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.

[24] It must be added that the condition precedent in s 90A(1) coupled with the stipulation on the manner of its proof makes it clear in unmistakable terms that a document made admissible by the section is only one that was produced by a computer in the ordinary course of its use; and inapplicable to one that was not so produced. (Emphasis added.)

Subsequently in the Federal Court case of *Ahmad Najib Aris v Public Prosecutor*, Zulkefli Makinudin FCJ (later PCA) held as follows with emphasis added by me:

> [33] I agree with the views expressed in the above passages from *Hanafi Mat Hassan v Public Prosecutor* in the analysis of s 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s 90A(2) or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under s 90A(4). On the other hand the presumption contained in s 90A(6) can be resorted to only when the document was not produced by a computer in the course of its ordinary use.
>
> ...
>
> [37] Notwithstanding the above arguments advanced on behalf of the appellant and the prosecution, I am of the view that before the CCTV tapes can be admitted as evidence it must be considered whether they are documents produced by a computer. A CCTV tape clearly falls within the definitions of 'document' and 'computer' under s 3 of the Act.
>
> ...
>
> *[40] A CCTV tape is therefore a document produced by a computer. It follows that the CCTV tapes (P19A-D) must satisfy the requirements of s 90A of the Act before they can*

be admitted in evidence. As this had not been done they are inadmissible. (Emphasis added.)

[31] Consequently for purposes of admitting exhs P87C, P88C and P82 in evidence, it is incumbent upon the prosecution to mandatorily either tender the certificate of the person(s) who managed and maintained the decoder in Eng Tatt Trading shop and in the house of the accused pursuant to s 90A(2) of the EA or otherwise procure their attendance in court to testify that the respective decoders were in good working condition and properly functioning in its ordinary use at the time when the video recording was recorded from the CCTV cameras. Both were however not done. For purposes of the decoder in the Eng Tatt Trading shop, it is inadequate for the prosecution to rely on the mere testimony of TWT1 who testified that the decoder was in good working condition and properly functioning when the video recording could be and were burned into CDs (exhs P87C and P88C) from the decoder by SP12 on 18 May 2015. The relevant time pertaining to the functional ability of the decoder is in my view on 12 May 2015 when the video recording was made. Hence, the relevant person who directly managed and maintained the decoder who has been identified as Ooi Jeat Sheng or otherwise at the very least, perhaps the proprietor of Eng Tatt Trading shop ought therefore to be called as the witness to testify on the working condition of the decoder at that material time. I am mindful that SP15 has used his best endeavours to procure the attendance of Ooi Jeat Sheng in court but was unsuccessful in tracing him. There is however no provision in s 90A of the EA permitting reception of the evidence if his attendance could not reasonably be secured. Likewise, it is inadequate for the prosecution to rely on the testimony of TWT2 who seized the decoder (exh P82) without calling the relevant person who managed and maintained the decoder at all material times as a witness. As to the latter, I am mindful that the prosecution has also contended that s 90A of the EA did not apply to the decoder that was seized from the house of the accused since the decoder being the real evidence itself was produced and viewed by the court as played over during the testimony of SP13. In my view, this did not make any difference because there was still no cogent evidence as prescribed by s 90A of the EA tendered before me that the decoder itself was in good working condition and functioning properly in its ordinary use at the material time on 12 May 2015.

[32] In the premises, I find and hold that the prosecution failed to comply with the mandatory requirements of s 90A of the EA to have exhs P87C, P88C and P82 admitted in evidence. Accordingly I hereby rule that they are inadmissible in evidence.

[33] As the result, I further rule that that the evidence of SP13 as well as her reports in exhs P92, P96 and P100 as well as the photographs in exhs P3(1–10) and P5(1–8) which were all based and/or produced from exhs P87C, P88C

and P82 are also inadmissible in evidence. In this regard, I refer to the case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 where Abdoolcader J (later SCJ) held as follows with emphasis added by me:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973–74 and 1972 respectively. *As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto*.

It was similarly held and the same effect was reached in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

[34] That notwithstanding, I am further mindful that the prosecution has implored me to alternatively accept and admit exhs P87C and P88C based on what SP12 and SP14 saw from the monitor screen of the decoder in Eng Tatt Trading shop on 13 May 2015 which they confirmed are identical with the contents of exhs P87C and P88C. In this regard, the prosecution relied on the case of *Public Prosecutor v Jowy Manjoro* [2007] 6 MLJ 342 where the admission of tape recorded evidence was admitted with greater flexibility. In that case, Ahmad bin Hj Maarop J (now PCA) held as follows:

> In my view, in the end, the evidence which must be adduced in introducing a tape recording depends on the circumstances of each case. The test is whether there is sufficient material before the court to warrant it to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence. This was stated by Supreme Court of Victoria in *R v Chen* [1993] 2 VR 139, where Marks, Southwell and Harper JJ in delivering the judgment of the court said at p 150:
>
> > *The test is whether there is sufficient material before the court to allow the tribunal of fact acting reasonably to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence*. In other words, there must be evidence, which the tribunal of fact is entitled to accept, that the recording of the conversation which occurred and which would be admissible if proved by oral testimony. In our opinion, *admissibility does not depend on the party tendering the tapes having removed absolutely any chance that they are inaccurate*. (Emphasis added.)
>
> In fact in *R v Masqud Ali* Marshall J said at p 469 that:
>
> > There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.

[35] I have carefully read the aforesaid case and I find the facts dissimilar from those before me. In that case, it is plain that His Lordship is satisfied the video camera that recorded the conversation was working properly because the police officer who set up the camera and recording equipment verified at the trial that they were indeed working properly. In contrast, there is nobody here in this case who verified that the CCTV cameras and decoder were working properly on 12 May 2015. Be that as it may, I am now bound by the later Federal Court case of *Ahmad Najib Aris v Public Prosecutor* where it is incumbent upon the prosecution to either produce the s 90A(2) certificate or call the relevant witnesses to testify on the working condition of the decoder. For completeness, it is also in my opinion immaterial that SP12 and SP14 in fact viewed the video recording from the decoder on 13 May 2015 for purposes of admitting what they saw. This is because the visual images seen by them are based on the inadmissible video recording in the first instance.

[36] In the premises, I am constrained to hereinafter analyse whether the prosecution has made out a prima facie case based on the remaining admissible evidence adduced by the prosecution.

[37] It is provided in ss 300 and 302 of the Penal Code as follows:

> 300 Murder
>
> Except in the cases hereinafter excepted, culpable homicide is murder-
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.
>
> Illustrations
>
> (a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.
>
> (b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause

the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2 — Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustrations

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3 — Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill will towards the person whose death is caused.

Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5 — Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death. A has therefore abetted murder.

302 Punishment for murder

Whoever commits murder shall be punished with death.

[38] The ingredients of the offence that must be proved in a murder charge under s 300(c) of the Penal Code relied upon by the prosecution have been lucidly set out by Abdul Malik Ishak JCA in the Court of Appeal case of *Aziz Mat Shah v Public Prosecutor* as follows:

> [37] The essential ingredients to prove the offence of murder are:
>
> (a) that the deceased is dead;
>
> (b) that death was caused by the act of the accused (here appellant); and
>
> (c) that the act of the accused (here appellant) was done with the intention as enumerated in s 300 of the Penal Code.
>
> ...
>
> [40] In regard to the third ingredient concerning the third limb to s 300 of the Penal Code, we categorically say that the learned High Court judge was correct in her assessment of the available evidence to invoke the third limb — that would be limb (c), to s 300 of the Penal Code. Towards this end, it is germane to refer to the case of *Virsa Singh v State of Punjab* AIR 1958 SC 465 where V Bose J, enumerated the ingredients to be proved under the third limb to s 300 of the Indian Penal Code which is in pari materia with our third limb to s 300 of the Penal Code. There, at p 467, His Lordship had this to say:
>
> To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300.
>
> First, it must establish, quite objectively, that a bodily injury is present.
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
>
> Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient

in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

[39] Consequently and as to the first ingredient of the offence that the victim is dead, I find that SP7 who is the younger brother of the victim duly identified the victim in the mortuary as well as in court from the photographs tendered by the prosecution (exhs P9(3) and P9(4)). SP15 also confirmed likewise. The death of the victim is corroborated by the testimony of SP4 who performed the autopsy on the body of the victim. The defence has neither disputed nor challenged the same.

[40] I therefore find that the prosecution adequately proved this ingredient of the offence on maximum evaluation.

[41] As to the second ingredient of the offence that the death of the victim was caused by the injury sustained by him, I find that it is due to a gunshot wound to the neck as explained by SP4 who performed the autopsy on the victim. The detail explanation is found in SP4's autopsy report (exh P18). In essence, it was a fatal gunshot to the neck of the victim. The bullet entered on the right side and exited on the left side of the neck that wounded the arteries, veins and other tissues along the passage of the bullet. According to SP4, there was no chance of survival of the victim. Again the defence has neither disputed nor challenged the same.

[42] In the premises, I further find that the prosecution adequately proved this ingredient of the offence on maximum evaluation.

[43] Moving on to the third ingredient of the offence that the death of the victim was caused by the act of the accused, I find from the admissible evidence adduced by the prosecution that SP8 on 12 May 2015 at about 7pm in the restaurant merely heard a loud sound resembling that of a gunshot fire within the vicinity of the place of incident. She thereafter from the back entrance of the restaurant saw the victim about 100 metres away lying down on the back lane after having fallen from a motorcycle. She also saw another man on another motorcycle picked up something adjacent to the victim's motorcycle. In the circumstances, it is plain that she never witnessed the shooting of the victim. She did not also identify the rider who picked up the aforesaid thing and the number plate of his/her motorcycle.

[44] Subsequently upon searching the place of incident later that night, I find that SP15 who led the police investigating team found a spent 9mm Luger

bullet shell on the back lane. However, the police investigating team did not recover the gun during all material times or at all.

[45] The defence conceded that the Motorcycle belonged to the accused. During the day of arrest of the accused on 15 May 2015 in his house at No 1317, Jalan Kubang Semang, Permatang Pauh, Pulau Pinang, I find that SP11 saw blood stains on the windshield of the left side of the motorcycle that was parked outside the house, the white coloured cover of the pink coloured plastic Cintan box in the basket of the motorcycle and a grey coloured helmet that was hung on the motorcycle. These were seized by SP15 and sent to SP10 for forensic examination including DNA profiling analysis. As testified by SP10 I find that the DNA profile of the victim obtained from his t-shirt, short trousers, underpants and money notes retrieved from the place of incident matched his DNA profile in the blood stains of the windshield of the motorcycle and the plastic Cintan box. In addition, there were mixed DNA profiles belonging to two individuals on the cotton swab of sweat obtained from the left handle of the motorcycle. The DNA of the accused could not be excluded as from one of the individuals according to SP10.

[46] It is common ground that there is no direct evidence tendered by the prosecution of anyone seeing the accused shooting the victim. Consequently, the prosecution has to rely on the circumstantial admissible evidence adduced to prove and conclude that it was indeed the accused who shot the victim.

[47] In the Supreme Court case of *Jayaraman & Ors v Public Prosecutor* Suffian LP comprehensively held as follows in respect of circumstantial evidence with emphasis added by me:

> In *Kartar Singh & Anor v Rex* [1952] 1 MLJ 85b, the appellants had been convicted of the offence of culpable homicide not amounting to murder. Murray-Aynsley CJ in giving the judgment of the Singapore Court of Criminal Appeal brought out the difference between the effect of direct and circumstantial evidence. Allowing the appeal, he said:
>
> > The case against the appellants was put carefully and accurately to the jury. We consider however that this is one of the cases in which the evidence even if believed, did not constitute proof of the guilt of either of the appellants. Here it is necessary to distinguish between the effect of direct and circumstantial evidence. Where there is direct evidence, however slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed there is no reasonable alternative to the guilt of the accused. If there is anything less than this it is no case at all.
>
> In *Idris v Public Prosecutor* [1960] 1 MLJ 296, the appellant had been convicted of

the murder of his ex-wife. Except for certain evidence with regard to motive, the case for the prosecution consisted entirely of circumstantial evidence. In his summing-up the learned trial judge had said:

> With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in LR 1 App Cas 278 at p 279:
>
> > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel. In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected circumstances that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is no use at all.

On appeal, the Court of Appeal held that the learned trial judge had dealt fully in his summing-up with the onus of proof and with the principle of reasonable doubt. The jury could have been in no doubt how they should properly consider and arrive at their verdict and therefore there were no grounds for saying that their final verdict was unreasonable

In *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307 the appellant was convicted of the murder of a woman and her child. The evidence against the appellant was entirely circumstantial and this was one of the grounds of appeal. Thomson CJ, as he then was, in giving the judgment of the Court of Appeal said:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. *It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?*

In the Singapore case of *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 the appellant had been convicted of murder. One of the matters relied on at the hearing of the appeal was that the learned trial judge had erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. In his summing up the learned trial judge had said —

> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether

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> the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime, or is there some reasonably possible explanation, such, for example — 'Was it an accident?'

Later he said:

B

> Now, as I told you earlier, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them all, lead you to? Adding them together, considering them not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or

C

> is there some other reasonably possible explanation of those facts?
>
> The prosecution case is that the effect of all the evidence drives you irresistibly and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.

D

It was held in the Federal Court that those directions were perfectly adequate in a case where the prosecution was relying on circumstantial evidence.

In the case of *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25 the appellant appealed against his conviction for murder. There was no eyewitness of the attack on the deceased; the prosecution case was based entirely on circumstantial evidence.

E

Ong Hock Thye FJ, as he then was, in giving the judgment of the Federal Court said:

> In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.

F

In *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36 the appellant appealed against his conviction for murder. The evidence against the appellant was circumstantial and Pike CJ (Borneo) in giving the judgment of the Federal Court allowing the appeal said:

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> The onus on the prosecution where the evidence is of a circumstantial natureis a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

In *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179 where the appellant was charged with rape, it appeared that the only evidence which could corroborate the

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evidence of the complainant was circumstantial evidence. The appellant was convicted and he appealed to the Federal Court. Ong CJ in giving the judgment of the Federal Court allowing the appeal said:

I

> Wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in one direction, that is to say, suggest or lend support to an inference of guilt. This evidence — if capable of an innocent interpretation or ambiguous as being equally consistent with guilt or innocence — should never be pleaded before the jury as circumstantial evidence strengthening the prosecution case. Any summing-up which falls to explain this intelligibly to the jury is a serious

> misdirection. All the more so where in the instant case, circumstantial evidence more consistent with innocence than guilt was represented to the jury as corroboration of the complainant's evidence. On the other hand, where the circumstantial evidence is seen to be strongly in favour of the defence, a proper trial requires that, in the interests of justice, this fact be brought to the notice of the jury and not passed over as an irrelevant detail.

Thus it will be seen from the above that in a trial with a jury here and in Singapore it has been consistently held that where the prosecution depends on circumstantial evidence it is not enough to direct them simply that the prosecution has to prove its case beyond reasonable doubt; but the judge must go further and direct the jury that the burden on the prosecution is heavier than where it depends on direct evidence and that is that the evidence to justify a conviction must irresistibly point to one and only one conclusion and that is the guilt of the accused.

...

In *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168 on a charge of murder the trial judge had indicated to the jury that 'there was no direct evidence in the sense that the prosecution have not produced witnesses to say they saw someone attacking the deceased. But in law a fact can be proved by indirect evidence or circumstantial evidence which can show who was the person who did it'. Later the learned trial judge had said, 'Although there is no direct evidence, I think there is circumstantial evidence — and it is said that circumstantial evidence can have the accuracy of mathematics'. The Federal Court held that the direction to the jury was inadequate. Reference was made to the English case, *Hodge* (1838) 2 Lewin 227, and to the Australian cases of *Plomp v The Queen* [1963] 110 CLR 234 and *Martin v Osborne* [1936] 55 CLR 367 but although reference was also made to *McGreevy* [1973] 1 WLR 276; [1973] 1 All ER 503, the remarks of Lord Morris of Borth-Y-Gest about *Hodge's case* (1838) 2 Lewin 227 were not mentioned. In *McGreevy* [1973] 1 WLR 276; [1973] 1 All ER 503 Lord Morris of Borth-Y-Gest had said:

> The singular fact remains that here in the home of the Common Law *Hodge*'s case has not been given very special prominence; references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing-up as defective. I think this is consistent with the view that Hodge's case was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial.

In *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168 the Federal Court cited the view of Lord Morris of Borth-Y-Gest that:

> It would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt.

At the same time the Federal Court cited the case of *Karam Singh v Public Prosecutor*

A [1967] 2 MLJ 25 where the Federal Court had said:

> In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.

B In *Kamis v Public Prosecutor* [1975] 1 MLJ 46 the learned trial judge on a charge of murder had told the jury 'for a court to rely on circumstantial evidence the evidence when considered must point only to the guilt of the accused; it must not be capable of any other interpretation or any other meaning'. This direction was approved by the Federal Court.

C In *Lim Foo Yong v Public Prosecutor* [1976] 2 MLJ 259 Chan Min Tat J as he then was, allowing an appeal from the sessions court applied the test laid down in *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25.

...

D As Syed Othman FJ, said in the instant case this is only a 'play on words'. *If the facts proved point to a reasonable alternative to the guilt of the accused, that is only another way of saying that there is a doubt in the prosecution case and so the prosecution has not proved its case beyond reasonable doubt. Similarly if the facts proved show some reasonably possible explanation, for example an accident, or if they are inconsistent with*
E *any other hypothesis than that of the guilt of the accused or if they are capable of an innocent interpretation or if they are ambiguous as being equally consistent with guilt or innocence. In all these cases the facts proved do not point to the guilt of the accused, the trial court is or cannot be sure that the accused is guilty and must acquit — because the prosecution has not proved its case beyond reasonable doubt.* (Emphasis added.)

F The Supreme Court again affirmed the aforesaid principles in *Ng Thian Soong v Public Prosecutor*.

[48] I have therefore to determine whether there are sufficient strands of
G circumstantial evidence adduced before me by the prosecution to conclude that it was the accused who rode the motorcycle and shot the victim at the place of incident at the material time beyond reasonable doubt. As to the evidence of SP8, I can only safely infer and conclude that the victim was gunshot down on 12 May 2015 at about 7pm at the place of incident. The evidence of SP15 on
H his visit to the place of incident later on the same night confirmed that the victim was indeed gunshot down by the discovery of the spent bullet shell there.

[49] The subsequent discovery of blood stains of the victim by SP11 and
I verified by the DNA analysis of SP10 on the windshield of the left side of the motorcycle that was parked outside the house of the accused and on the white coloured cover of the pink coloured plastic Cintan box in the basket of the motorcycle per se likely, though in my view not necessarily, lead to the inference that the victim was shot down by the rider of the motorcycle. This is

because there could have been other occasion(s) the victim might have come into contact with the motorcycle prior to the fateful shooting at the place of incident.

[50] Most pertinently and although the accused is the registered owner of the motorcycle, there is no unequivocal evidence before me that he was the rider of the motorcycle at the time the victim was shot. This is because and I so find that the DNA analysis of SP10 on the handle of the motorcycle showed there is the DNA of other rider(s) besides the accused found on the handle of the motorcycle when it was seized by the police several days later on 15 May 2015. Without proof of exclusive access to the motorcycle, I could not safely infer and conclude that the accused was indeed the rider of the motorcycle at the material time the victim was shot. It may perhaps have been different if there were witness(es) who comprehensively testified on the whereabouts of the accused on that fateful day when the victim was shot.

[51] That aside, there is no evidence adduced by the prosecution of any relationship or friendship between the accused and the victim. In other words, there is nothing to objectively link one with the other. Moreover, there is no evidence that the accused is also connected in any way with the possession of the gun or bullets used to shoot the victim.

[52] In the circumstances, I find from the totality of the combined strands of admissible evidence adduced by the prosecution when 'twisted together as a rope are not strong enough to hang' the accused. They could not collectively form the irresistible conclusion that plainly pointed to the accused having shot the victim. I am therefore not satisfied that the prosecution has succeeded in proving the third ingredient of the offence beyond reasonable doubt that the death of the victim was caused by the accused on maximum evaluation.

[53] Consequently, it is unnecessary for me to further consider the fourth ingredient of the offence that the act of the accused was done with the intention of causing such bodily injuries and such bodily injuries were sufficient in the ordinary cause of nature to cause death.

CONCLUSION

[54] For all these reasons, I find that the prosecution failed to establish a prima facie case against the accused as charged. Accordingly, I order that he be discharged and acquitted.

Accused acquitted and discharged.

Reported by Mohd Kamarul Anwar